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No. 00-1609

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

UNIVERSITY OF TEXAS LAW SCHOOL,
Petitioner,

v.

CHERYL J. HOPWOOD, *et al.*
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* OF TEXAS LAW SCHOOL DEANS IN SUPPORT OF PETITIONER'S REQUEST FOR GRANT OF WRIT OF CERTIORARI

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THE INTEREST OF THE *AMICUS CURIAE* [1]

The Texas Law School Deans are an informal group of current deans representing private and public law schools in Texas: serving as Deans are Dean Brad Toben, Baylor University School of Law; Dean Nancy Rapoport, University of Houston Law Center; Dean Bill Piatt, St. Mary's University School of Law; Dean John Brittain, Thurgood Marshall School of Law at Texas Southern University; Dean W. Frank Newton, Texas Tech University School of Law; Dean Richard Gershon, Texas Wesleyan University School of Law.[2] These Deans meet with each other in connection with matters of mutual interest and concern. Recent meetings of these Texas Law School Deans have been with the American Bar Association Consultant on Legal Education and with the Board of Bar Examiners of the State of Texas. The Texas Law School Deans have direct knowledge about the impact of the ruling in *Hopwood v. Texas* on their respective law schools and its affect on legal education in Texas. 236 F.3d 256 (5th Cir. 2000), *petition for cert. filed* (U.S. April 17, 2001) (No. 00-1609); *see also Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding the University of Texas School of Law's affirmative action admissions policy was a violation of the United States Constitution's Equal Protection clause).

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[1] Letters from each party consenting to the filing of this brief have been filed with the Clerk. No counsel for a party authored this brief in whole or in part. The only entity that made a monetary contribution to the preparation or submission of this brief other than the Texas Law School Deans was the Texas Tech Law School Foundation, which provided funds for the printing costs.

[2] Dean Bill Powers of the University of Texas School of Law is a party to the suit in his capacity as Dean and therefore has not joined on this brief, although he personally supports the position of his colleagues.

SUMMARY OF ARGUMENT

The existence of an unbridgeable split of authority on the application of the Equal Protection Clause to legal education institutions places Texas law schools in a position of growing peril because diversity is harder to maintain at Texas law schools than at law schools in other states. Many educators believe that diversity is an essential ingredient to effective legal education. Certainly many students believe that diversity is important to legal education, and Texas legislators have repeatedly admonished Deans of Texas's public law schools to increase diversity. As long as *Hopwood* applies only to Texas law schools there will not be an equal application of the Constitution's "equal protection" clause.[3]

Producing new lawyers and judges is the primary charge of law schools. Collectively, lawyers and judges comprise the third branch of government. The existence of an unbridgeable split of authority on the application of the Equal Protection Clause to law schools places Texas's third branch of government in a politically perilous position. A reasonably diverse bench and bar is essential if the State of Texas is to nurture truly representative government in the 21st Century. A majority of Texas lawyers graduate from Texas's law schools. The future of the legal profession in Texas, and with it the future of democracy in Texas, is tied to the ability of Texas law schools to enroll reasonably representative student bodies. Unequal application of the Constitution's "equal protection" clause to admissions in Texas law schools places Texas's third branch of government in a position of growing political peril because diversity is harder to maintain in Texas than elsewhere.

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[3] Recently a similar decision was rendered against the University of Michigan Law School under *Grutter v. Bollinger*, 2001 WL 293196 (E.D. Mich. 2001) but was subsequently stayed by *Grutter v. Bollinger*, 2001 WL 327822 (6th Cir. 2001).

ARGUMENT

I. THE EXISTENCE OF AN UNBRIDGEABLE SPLIT OF AUTHORITY ON THE APPLICATION OF THE EQUAL PROTECTION CLAUSE TO LEGAL EDUCATION PLACES TEXAS LAW SCHOOLS IN A POSITION OF GROWING PERIL BECAUSE DIVERSITY IS HARDER TO MAINTAIN.

Whether or not the plurality opinion of Mr. Justice Powell in *Regents of Univ. of Cal. v. Bakke* ever commanded a majority, it was openly relied upon by a large number of universities and law schools. 438 U.S. 265 (1978). Only within the last year has a single district court reached a conclusion in line with *Hopwood*. *See Grutter*, 2001 WL 293196 (E.D. Mich. 2001). In 48 states, the Powell plurality of *Bakke* defines equal protection as was recently confirmed by the United States Court of Appeals for the Ninth Circuit in *Smith v. Univ. of Wash., Law Sch.* 233 F.3d 1188 (9th Cir. 2000).[4] In 48 states, using race as a factor in admissions decisions is permitted, but not in Texas under *Hopwood*. This current constitutional divide cannot be bridged absent a decision by this Honorable Court, and pending such a decision Texas law schools will continue to suffer.

The racial diversity of a student body is deemed to be an essential ingredient by many legal educators and is an element to be considered in accreditation by the American Bar Association and for membership in the Association of American Law Schools. *ABA Standards for Approval of Law Schools*, S 210-11 (1999); *Bylaws of the Association of American Law Schools* § 6-4 (2000), *at* http://www.

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[4] In California and Washington affirmative action policies applicable at public institutions were withdrawn after propositions calling for the abolition of affirmative action were passed and statutorily codified. CAL. CONST. Art. I, § 31(a); WASH. REV. CODE ANN. § 49.60 (West 2000).

aals.org/bylaw.html. Many students believe that diversity is important to legal education and elect to attend law schools where such diversity exists. Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 Calif. L. Rev. 2241, 2249 (2000). Law schools in Texas have been asked to report to the Texas Legislature on racial diversity, and pubic law schools that depend on state funding are expected to enroll student bodies reasonably representative of the citizenry of the State. According to the last national census, Hispanic/Mexican American Texans are the fastest growing racial group in the State. U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA; U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION AND HOUSING (showing that a comparison of the 1990 and 2000 census reveals that the Hispanic population in Texas has increased from 25% to 32 % of the total population). But law school enrollments in Texas do not show a similar growth. Information provided by the Texas Higher Education Coordinating Board (May 14, 2001) (on file with Paul Grubb, Director of Access and Equity for the Texas Higher Education Coordinating Board) (showing that Hispanic enrollment in Texas law schools has declined from 11.5% in 1992 to 10.7% in 2000 and that it peaked at 11.9% in 1996, the year the United States Court of Appeals for the Fifth Circuit decided *Hopwood*). African Americans are also underrepresented at Texas law schools, even though enrollment at the Thurgood Marshall School of Law at historically black Texas Southern University helps compensate for losses suffered at other Texas law schools. *Id.*; U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA; U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION AND HOUSING.

Law schools in 48 states can and do admit students while taking race into account. Law schools in 48 states can and do offer scholarships to students while taking race into account. It is therefore clear why minority enrollment is up for all

American law schools but down in Texas since *Hopwood* was decided. Information provided by the Texas Higher Education Coordinating Board (May 14, 2001) (on file with Paul Grubb, Director of Access and Equity for the Texas Higher Education Coordinating Board); U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA; U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION AND HOUSING. This Honorable Court should grant certiorari to insure that there is equal application of the Constitution's "equal protection" clause to all law schools.

II. THE EXISTENCE OF AN UNBRIDGEABLE SPLIT OF AUTHORITY ON THE APPLICATION OF THE EQUAL PROTECTION CLAUSE TO LEGAL EDUCATION PLACES TEXAS'S THIRD BRANCH OF GOVERNMENT IN A POSITION OF GROWING PERIL BECAUSE DIVERSITY IS HARDER TO MAINTAIN.

The current disposition of the affirmative action issue creates an unbridgeable split of authority between *Bakke* and *Smith*, on the one hand, and *Hopwood* and *Grutter* on the other. 48 states follow *Bakke* and *Smith*. Texas hews to a different application of the Equal Protection Clause. This difference places Texas's third branch of government in a position of political peril since a reasonably diverse bench and bar is essential if the State of Texas is to nurture truly representative government in the 21st Century.

Of course even if the population is more racially diverse in Texas and less diverse in Texas law schools, it does not automatically follow that the bench and bar will be less diverse unless the majority of Texas lawyers graduate from Texas law schools. Thus, the pivotal question is where do lawyers admitted to the bar in Texas go to law school? More specifically the question is where do recent bar applicants go to law school since diversity in bar admissions has grown dramatically in recent years. Ten years ago 84% of all

lawyers admitted to practice in Texas that year graduated from Texas law schools. Information provided by the State Bar of Texas (May 16, 2001) (on file with Carol Cannon, Membership Office). Five years ago 82% of all lawyers admitted to practice in Texas that year graduated from Texas law schools. *Id.* In 2000 71% of all lawyers admitted to practice in Texas graduated from Texas law schools. It is clear that diversity in the third branch of government in Texas is largely dependent on diversity in Texas law schools. *Id.* This can only be achieved if Texas law schools are allowed to operate under the same constitutional guidelines as law schools in other states.

CONCLUSION

Permitting the unseemly existence of an unbridgeable split of authority on the application of the Equal Protection clause to legal education threatens Texas law schools and the third branch of government in Texas. Therefore this Honorable Court should grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in *Hopwood v. Texas*.

Respectfully submitted,

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